TESTIMONY OF J. CLIFFORD WALLACE
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Before
The Subcommittee on Administrative Oversight
and the Courts of the Senate Judiciary Committee

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My name is J. Clifford Wallace. I have been a federal judge for 34 years, initially on the District Court, and as a member of the Ninth Circuit since 1972. I served as Chief Judge from February 1, 1991 to March 1, 1996. I speak for myself only.

This is not the first time I have testified in opposition to division of the Ninth Circuit, nor do I suppose it will be my last. My view is that the arguments in support of the current bills suffer from the same flaw as their predecessors: they fail to meet their burden of proof. As identified in the Long Range Plan for the Federal Courts:

> Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

That simply has not been done. That should end this renewed division attempt. I have earlier identified my reasons in the attached law review article (56 Ohio St. Law Journal, 941-45 (1995)).

But for a few minutes today, I wish to discuss this issue on a national level. Indeed, the action requested here would change our approach to the federal appellate structure as we have known it. The issue, I suggest, is more than the Ninth Circuit and whether it should be divided, but what type of federal appellate system is best for our country in the 21st century.

My interest in the larger picture of judicial systems started in 1976 when, as a scholar at the Woodrow Wilson International Center for Scholars at the Smithsonian Institute, I began my study of judicial administration. As my attached personal data shows, I continued my interest nationally and internationally: serving on the Judicial Conference of the United States and many of its committees, Ninth Circuit Conference and circuit committees, the Judicial Council, and working with foreign judiciaries now numbering over 50 worldwide. From this broader experience, I wish to make the point that for now and the foreseeable future, our country will be better served by fewer large circuits.

Those who champion division seem to express a preference for a small court culture. Chief Judge Emeritus Gerald Tjoflat of the Eleventh Circuit, in an article in the *ABA Journal*, likened his vision of a small and collegial court to "life in a small town," which he contrasts with "a big city, [where] many people do not even know, much less understand, their neighbors." This is indeed a romantic and appealing notion: a "small town" where everyone knows everyone intimately, and where the town is governed by consensus reached at occasional town meetings. Judge Tjoflat contrasts this vision with the faceless, impersonal, and bureaucratic "jumbo court," which he decries as less efficient and less predictable.

Some decline in collegiality usually accompanies growth in an organization, the amount depending on what priority participants give to maintaining it at the highest possible level. Life in a larger court is different; some aspects of the old relationship are lost as judges are added.

The ultimate test is not the comfort of judges, but what is best for the country. The federal courts do not exist for the benefit of judges. They exist, at taxpayer expense, solely to serve and to meet the needs of the public. Judges are, fundamentally, public servants. Judiciary policy must be dictated by concerns for the judiciary's mission, not by the personal preferences of its members.

Thus, I am not sure that the "life in a big city" versus "life in a small town" argument advances the debate very far. We would probably all like to return to the time of Learned Hand and enjoy the bygone days of a limited calendar with a great amount of available reflective time. But, as disputes in our society proliferate, sending case filing statistics skyward and creating greater demands than ever for judicial resources, I doubt this is a reasonable alternative.

The U.S. Court of Appeals for the Ninth Circuit, with 28 judgeships, is the largest in the United States. The fact is that large federal courts of appeals have many advantages and can better serve the public's needs. Large circuits like the Ninth can enhance stability, predictability, and efficiency in the law.

Stability and predictability

Critics maintain that the law in a large court is inherently unstable and unpredictable. It is true that the number of possible panel permutations in a court increases exponentially as the number of judges increases incrementally and that one cannot predict which panel will hear one's appeal. It does not follow, however, that the law in such a court will be unpredictable or unstable.

Of course, for lawyers and litigants, the best guide for predicting the outcome of any litigation is a case on point. When there is no case on point, they are left to shrug their shoulders and speculate as to how a court will rule. The more published decisions from which to work, the more guidance the lawyers—and the trial court judges—receive. Recognizing this principle, some smaller jurisdictions with small courts voluntarily opt to follow the law of the State of California—the largest judiciary in our country—for the very purpose of providing guidance and predictability to lawyers and litigants. Guam is a good example.

Attorneys who practice law in small jurisdictions, where there is little precedent, know how difficult it is to plan or to predict. It is the small court that leaves lawyers and litigants guessing. A larger court is capable of providing sufficient case law to provide truly useful precedent; it is precisely in such a court where one can find a case on point.

But will these added cases lead to conflict and inconsistency? In *Restructuring Justice* (Cornell University Press, 1990), Professor Arthur Hellman published a collection of articles analyzing the Ninth Circuit and commenting on the future of the judiciary. Hellman's empirical study found that the feared inconsistency in the decisions of a large court simply has not materialized. Professor Daniel J. Meador described Hellman's study as "the most thoroughgoing, scholarly attempt that has yet been made" on the issue, and concluded that it "goes far toward rebutting the assumption that such a large appellate court, sitting in randomly assigned three-judge panels, will inevitable

generate and uneven body of case law." The contrary view, though popular, is unsupported by evidence, and is really nothing more than a seat-of-the-pants assumption.

Efficiencies

Certain inefficiencies are introduced as a court grows. It does not follow, however, that individual judge efficiency declines each time a new judge joins the court. This is borne out by comparative statistics among the circuits. Last year the Ninth Circuit was second best in judges promptness as measured by median time from hearing to disposition and tied for first for submission to disposition. It is clear that although there is disparity in the relative efficiencies of the different courts, such differences cannot be attributed to the size of the courts.

Indeed, there are corresponding efficiencies that come with growth, although these are often overlooked in the current debate. An example is in solving the problem of panel conflicts. The Ninth Circuit uses an automatic issue coding system, which apprises the court as to what panels are working on what issues. This helps avoid intracircuit conflict and permits the panel to which the issue is first assigned to decide the case. This lessens the conflict possibilities.

Congress has not been oblivious to the need to work differently in a large court. Pursuant to the Omnibus Judgeship Act of 1978, federal appellate courts of 15 or more judgeships may, by local rule, divide into administrative units and conduct en banc hearings with less than the full court.

In the Ninth Circuit, a court of 11 judges is designated when an en banc hearing is required. The full court may overrule the en banc court, but we have never voted to do so. Why? Because the court is willing to rely on 11 of its judges for purposes of finality. Thus, unless judges believe they must have their hands on every en banc pencil, there is an alternative to full-court en bancs in a large court. Is it wrong? No, just different. It magnifies the efficiencies of a large court and eliminates what might be one of its inefficiencies. As stated in the 1990 Report of the Federal Courts Study Committee:

> The limited en banc appears to allow more efficient use of court of appeals resources and should be available to the other courts of

> appeals, even those that do not regularly have fifteen active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for en banc courts of unwieldy size.

Thus, in addition to the challenges, growth has brought opportunities. Although growth carries with it certain inherent limitations, it simultaneously opens the door to new and exciting possibilities. The large court is a cumbersome animal indeed if one persists in operating as if it were a small court. Although adaption and innovation are often difficult for tradition-bound judges, judges should answer the call. The opportunities are there, and the world will not wait for us.

The alternative

If large circuits are rejected, division is inevitable. Many concerns could be addressed by further subdivision of the twelve general jurisdictional federal circuits. Certainly courts could be more collegial, with less need to sit en banc, if we had 20 mini-circuits of just nine judges each, and no large courts. But this would fragment the federal law much more than multiple panels within a large circuit. Under this alternative, continuing growth would mandate continuing division. How would the litigants cope with 30 circuits—with 40 circuits? Yet if you adopt the principle of division to keep circuit courts small, you must eventually confront the balkanization of federal law.

A network of smaller circuits would ensure that no circuit had a large volume of case law. Lawyers and litigants would routinely be forced to search the law of neighboring circuits for guidance—knowing full well that their circuit had no obligation to follow out-of-circuit law. Their choices would expand substantially, with increased intercircuit conflicts. At least in the large court, the parties know their panel is bound by the prior-panel rule.

Dividing larger circuits into smaller circuits will exacerbate the problem of the prior-panel rule because it is without binding force when the prior panel is from a neighboring circuit. Thus, the primary concerns about large courts—instability and unpredictability in the law—can only be worsened by dividing them into smaller circuits. In fact, this presents a compelling case for consolidating existing circuits to create fewer, larger federal appellate courts.

Therefore, it is no solution to stick with "small town" courts and just have a lot of them. Nor is it wise to accept the ostrich-like approach, insisting that a few small courts really can contain this swelling stream of litigation, and stubbornly cling to the smaller courts we have known. The judiciary should confront the challenges inherent in growth and deal with them productively.

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Of course, there are growing pains and a certain awkwardness as a court learns to function with larger numbers. These are challenges to confront, not challenges from which to retreat. Large courts are not wrong—just different. In the long run, fewer larger circuits may be the better structure for litigants.

I can remember the nostalgic days of the corner store with the pickle barrel. I might prefer to be a grocer in such an environment. But with the growth of society's demands, the supermarket has taken its place. We, too, need to keep an open mind in determining what model will best serve the long-term interests of the people we serve.